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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-837

JOHN WAYNE SHELTON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE NORTH CAROLINA COURT OF APPEALS

****

PETITION FOR WRIT OF CERTIORARI

****

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The petitioner, John Wayne Shelton, prays that a writ of certiorari issue to review the judgment made by the North Carolina Court of Appeals, entered July 11, 1973, affirming the conviction of the petitioner by the Superior Court Division, General Court of Justice of Forsyth County, North Carolina, which judgment the Supreme Court of North Carolina refused to review by its denial of petition for writ of certiorari entered September 3, 1973.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals ____N.C. App. ____, 197 S.E.2d 588 (1973) is appended to this

petition. The judgment of the Supreme Court of North Carolina denying petitioner's petition for certiorari, _____ N.C. ____, 198 S.E.2d 728 (1973) is also appended to this petition.

JURISDICTION

The judgment of the Superior Court of Forsyth County convicting the petitioner of the offense of attempted safecracking in violation of North Carolina General Statutes 14-89.1 and ordering him to be imprisoned for not less than fifteen or more than twenty-five years in the State prison was made and entered October 20, 1972. Petitioner's relief in the North Carolina courts was exhausted when his conviction was affirmed by the North Carolina Court of Appeals and when on September 3, 1973 the Supreme Court of North Carolina denied his petition for certiorari. The jurisdiction of this court is invoked under 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED

I. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the sentencing judge, during the sentencing proceedings, relied on unsworn, out-of-court hearsay statements which were materially false?

II. Whether the petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were abridged when certain evidence seized in a search of the petitioner's vehicle was allowed into evidence over the petitioner's objection?

III. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when a State's witness was allowed to make immaterial and highly prejudicial statements based on hearsay stating that he had been placed in protective custody because somebody had put a "contract" out on him?

IV. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution which conviction was based on the uncorroborated and uncertain testimony of that alleged accomplice?

V. Whether the petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the State's attorney was allowed to ask over the objections of petitioner's attorney whether the petitioner had been involved in a number of break-ins and robberies, none of which had resulted in his conviction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

AMENDMENT IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was tried under an indictment which charged that on the 28th day of September, 1971, he did unlawfully, willfully and feloniously attempt to force open the safe of Builder's Harbor, Inc., located at 1309 South Hawthorne Road, Winston-Salem, North Carolina, and that the safe was used for storing chattels, money and other valuables. (R p. 4) Petitioner was tried during the October 16, 1972 regular session of the Superior Court Division of the Forsyth County General Court of Justice. At the trial the petitioner entered a plea of not guilty.

Prior to trial petitioner's attorney moved for a continuance on two grounds: (1) on the ground that the district attorney had calendared some twenty cases against the petitioner for trial that week without notifying petitioner which of these cases would be called until the morning the trial began, October 16, 1972; (R p. 105) (2) on the ground that there were two witnesses for the petitioner which he could not have present to testify at that time. (R p. 106) This motion was denied. (R pp. 105-107)

During the trial a number of witnesses testified for the State. However, except for the testimony of the accomplice, Eddie Ray Spivey, there was no direct testimony that the petitioner had participated in the crime. The evidence for the State tended to show merely that a safecracking had occurred on the date in question.

The accomplice, Eddie Ray Spivey, testified that he was under indictment in 40 to 50 cases. (R p. 60) The testimony of Eddie Ray Spivey, the alleged accomplice, was exceptionally vague. (R pp. 48-62) He further testified that

he would "tell them anything" to keep from going to jail, (R p. 55) and that he had told the police that if he went back to jail he would not testify, but that he was just "kidding" when he said this. (R p. 58).

At the close of the State's evidence, the petitioner moved for a judgment of nonsuit. The motion was overruled. Petitioner than offered the testimony of himself and three others. During cross examination of the petitioner the district attorney was allowed to ask, over the petitioner's objection, whether the petitioner had been involved with Eddie Ray Spivey, the State's primary witness, in a series of robberies -- robberies the petitioner had been charged with but of which he had not been convicted. (R pp. 74-77) Following the petitioner's evidence he renewed his motion for nonsuit (R p. 90) which was denied.

The jury returned a verdict of guilty. During sentencing the trial judge stated that he knew about the petitioner "through some people I represent" and that his information about the petitioner was that he had "decided he was going to be a professional housebreaker and thief" and that he would be doing the petitioner's family "a great favor" in sentencing the petitioner. (R pp. 104-105) He then sentenced the petitioner to be imprisoned for a term of 15 to 25 years in the State's Prison. (R p. 105)

ARGUMENT

The decision below should be reviewed because the North Carolina Court of Appeals decided federal questions of substantial importance about which there is a great dispute between the States and about which certain decisions of this Court seemed to be in conflict.

The issues raised in this petition for certiorari are whether the petitioner was denied due process of law when the sentencing judge relied on materially false statements, when certain evidence seized in a search of the petitioner's vehicle was admitted into evidence over the petitioner's objection, when a State's witness was allowed to testify as to highly prejudicial and irrevelant matters, when the sole evidence against the petitioner was the testimony of an alleged accomplice which was not substantially corroborated by other testimony or evidence, and when the defendant was subjected to questioning about specific acts of misconduct which had not resulted in conviction. The North Carolina Court of Appeals held that the petitioner had not been denied due process of law in any of the above situations.

1. The petitioner was denied due process of law under the Fourteenth Amendment to the United States Constitution when the sentencing judge, during the sentencing proceedings, relied on unsworn, out-of-court hearsay statements which were materially false.

Following the jury's finding of guilt a brief sentencing hearing was held. The petitioner called several character witnesses and the petitioner's attorney argued to the trial court on behalf of the petitioner. During the testimony of one of the character witnesses the trial judge stated that he had information that the petitioner had "decided he was going to be a professional housebreaker and thief" and that he got this information from "some people that I (the trial judge) represent." (R p. 104) The trial judge then stated that he understood that the petitioner's family were "good people" and that he did not "blame them for this" and that "I think actually I would be doing them a great favor. . . ." (R p. 105) The petitioner's sentence then handed down by the trial judge was for a term of not less than 15 nor more than 25 years in the State's Prison.

It is clear from the above that the long and severe sentence handed down by the trial judge was based in part on the out-of-court assertions of an unnamed party which the petitioner was not allowed to confront or cross-examine. This is in violation of the petitioner's right to due process of law under the Fourteenth Amendment, for it is now elemental law that a person has a right "to reasonable notice of the charge against him, and an opportunity to be heard in his defense. . . and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and the right to be represented by counsel." Re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.ed. 682 (1948). Here the petitioner was informed of the accusations against him

(that he had decided to become a professional thief), but he was not informed as to who had given this information to the trial judge and, therefore, he was not allowed to cross-examine his accusers. The petitioner was thus able to do no more than deny that he was or had decided to become a professional thief. His denial was obviously ignored by the judge in giving such a lengthy sentence. By being placed in such a position and by having his sentence based on these materially untrue statements, the petitioner was denied due process of law.

Petitioner contends that the case of Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.ed 1690 (1948), requires that the petitioner's sentence be reversed. In Townsend it was held that due process is lacking when the sentencing judge relies on a materially false compilation of the criminal record of the defendant. If the petitioner can show that the accusations relied on by the trial judge during sentencing are materially false then he is entitled to a reversal under the holding in Townsend. However, unlike the defendant in Townsend who could show by reference to an inspection of public records that the information relied on by the sentencing judge was false, the petitioner finds it impossible to show that the accusations against him are false without knowing who made the statements to the trial judge and without the right to cross-examine those persons. In not being allowed to cross-examine these persons the petitioner's right to due process has been denied.

Petitioner is aware that this Court has held in Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.ed. 1337 (1949), and Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.ed 2d 516 (1959), that, under the circumstances of those cases, a sentencing judge may rely on confidential information from out-of-court sources in sentencing a defendant without violating due process. This Court held that while due process required the right to confront and cross-examine a defendant's accusers prior to judgment, this confrontation was not required to comport with due process during the sentencing proceedings. However, in both cases the defendant was asked if the facts relied on by the sentencing judge was true and each replied that the facts were true. Here the defendant denied that the accusations against him were true but was unable to show that the accusations were false, because he could not confront or cross-examine his unnamed and unseen accusers.

The petitioner was thus caught in a quandry. His conviction would be set aside under Townsend v. Burke, supra, if he could show that the accusations relied on by the trial judge were materially false. However, he was seemingly prohibited under the rational of Williams v. New York, supra, from discovering the names of his accusers and thus could not show the falseness of the accusations through the cross-examination of the accusers.

Petitioner contends, however, that there is no conflict between the Townsend and Williams decisions. For the decision in Townsend to be viable and meaningful the criminal defendant must have a way of determining that the sentencing judge relied on materially false information. Under the facts in the present case, the Williams v. New York decision cannot be read as prohibiting the petitioner from confronting and cross-examining his accusers. In Williams v. New York this Court specifically stated that its decision and holding in that case was "not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. See Townsend v. Burke, 334 U.S. 736, 92 L.ed. 1690, 68 S.Ct. 1252." Williams v. New York, 337 U.S. at 252 n. 18, 69 S.Ct. at _____, 93 L.ed. at 1345. It is clear from the citation of Townsend that this Court intended for the Townsend decision to remain viable and meaningful and that in the circumstances where false information is relied on by the sentencing judge, the due process clause is in full effect. Therefore, in cases such as the instant one, where a defendant contends that the information relied on by the sentencing judge is materially false, the due process clause requires that he be allowed to confront and cross-examine his accusers. By relying on information which the petitioner contends and contended was false and in failing to notify the petitioner as to who made those false accusations against him, the sentencing judge denied the petitioner his right to due process of law and the judgment must be reversed.

The possible conflict between this Court's decision in Townsend v. Burke, supra, and Williams v. New York is clear. This Court should grant this petition for certiorari to clarify the seeming conflict and to rectify the deprivations of the petitioner's right to due process.

2. The petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution were abridged when certain evidence seized in a search of the petitioner's vehicle was admitted into evidence over the petitioner's objection.

At the trial of the present case, the State attempted to offer evidence of certain items found in a 1968 Plymouth sitting in the street in front of the building in which the crime allegedly occurred. Petitioner's motion to suppress the evidence was denied following a voir dire hearing.

The petitioner contends that the search of the vehicle in question was unconstitutional. The search carried out was a non-consensual warrantless search. Such warrantless searches are per se unreasonable under the Fourth Amendment. As stated by Justice Stewart in Coolidge v. New Hampshire, 403 U. S. 443, 454-55, 91 S.Ct. 2022, 29 L.ed 2d 564 (1971):

> "The most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment - subject only to a few specifically established an well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption. . . that the exigencies of the situation made that course imperative." (Citations omitted)

It is clear that the search was not made incident to the petitioner's arrest or with petitioner's consent. That leaves the State with only two possible justifications for the search.

The State first seeks to justify its search, so far as the screwdriver and tire tool are concerned, under the theory that there was no search since these items were in "plain view." All testimony indicated that both of these objects were seen by the officers through the window of the 1968 Plymouth before they opened the door to the vehicle. This Court in Coolidge v. New Hampshire, supra, set forth the basic limitations on the "plain view" rule. One limitation was that the item in plain view must be of a contraband nature; i.e., the officer who views the item must know it is illegal to have that item. Coolidge v. New Hampshire, supra; United States v. Thomas, 16 U.S.C.M.A. 306; State v. Elkins, 25 Or. 279, 422 P.2d 250 (1966). Here the items observed in the car were a screwdriver,

a tire tool and three or four packages of prophylatics. (R p. 19). None of these items are of a contraband nature. Tire tools and screwdrivers are universally found in automobiles and there is no North Carolina law against the possession of prophylatics. Therefore, the items which were seized by the police officers in the 1968 Plymouth did not justify the officers in going into the car to seize those items and to expand the search to the glove compartment, where they found the petitioner's wallet and other items.

The State next attempts to justify its search on the grounds that the officers had probable cause to search the vehicle and thus did not need a search warrant. Under the theory which has evolved from Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.ed. 543 (1925), the State argues that police may make a warrantless search of an automobile when they have probable cause to do so. While automobiles, because of their mobility may be searched without a warrant on facts not justifying a warrantless search of a residence or an office, the officer must still have "probable cause" to believe he will find the instrumentality of a crime or evidence pertaining to a crime before he begins his warrantless search. Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221, 88 S.Ct. 1472, 20 L.ed. 2d 538 (1968). "There can be no question that in any event a prerequisite to a valid search is probable cause. . .even a 'strong reason to suspect' will not substitute for probable cause as grounds for an arrest or search. Henry v. United States, 361 U.S. 98, 101, 80 S.Ct. 168, 4 L.ed. 2d 134 (1950).

The State's reliance on Carroll and its progeny is inappropriate in the present case. The standards applicable to a factual basis used to support an officer's probable cause assessment at the time of a warrantless search are at least as stringent as the standards applied with respect to a magistrate's assessment where the officer seeks to obtain a warrant. Whiteley v. Warden, 401 U.S. 560, 91 S.Ct. 1031, 28 L.ed. 2d 306 (1971).

Clearly, the information available to the officers searching the car at the time of the search was not constitutionally sufficient to justify the issuance of a search warrant. All the officers knew was that the car was sitting on the street in front of the building in which the safecracking occurred and across the street from the Ardmore Taproom, that the hood was warm and that there was a tire tool on the floor of the car which could be seen through the window with the aid of a flashlight. It is unclear whether they checked for the registered owner of the automobile before or after they searched the car: R.H. Venable testifying that they searched the car and then checked on the registration (R pp. 18-22); R.H. Frye testifying that he found a wallet and papers with the petitioner's name on them in the car, but no testimony that he checked for the registered owner before making his search (R pp. 22-29); and S.L. Harmon testifying that he looked in the car, saw a tire tool and screwdriver, asked another officer who owned the car, was told the petitioner owned the car and then searched the vehicle. (R pp. 29-32). In its opinion the North

Carolina Court of Appeals found that the officers located the 1968 autmobile in front of the building but that "later it was determined that the automobile was registered in the name of the defendant, John Wayne Shelton." State v. Shelton, ___ N.C. ___, 197 S.E.2d 588, 589 (1973). The officers also did not know the reputation of the petitioner: Officer Venable testified that he had not seen the petitioner's record but had heard his name before (R p. 21); and S.L. Harmon testified that he did not know the reputation of the petitioner but that the petitioner's name had rung a bell in his mind. (R p. 31)

Probable cause either for an arrest or search exists only if the officer at the time of his action knows facts and circumstances which would warrant a prudent man in believing that a crime has been committed (in the case of an arrest) or that he will find the instrumentality of a crime or evidence pertaining to a crime (in the case of a warrantless search). Dyke v. Taylor Implement Mfg. Co., supra. Suspicion and good faith on the part of the arresting officer are not enough. Id. No facts in the officers' knowledge would warrant a prudent man in believing that they would find an instrumentality or evidence of the attempted safecracking in the automobile. All evidence indicated that nothing was missing from the building, since the safecrackers had been caught in the midst of the robbery and had left their tools and even a pistol behind them. No instrumentality of the crime or evidence of the crime

could logically be found in the automobile. The police were merely carrying out a general search to see what they could find. Such warrantless, general searches are prohibited by the Fourth and Fourteenth Amendments.

Since none of the "specifically established and well-delineated exceptions" to the search warrant requirement can justify the search in the present case, the evidence seized as a result of that illegal and unconstitutional search should have been suppressed at petitioner's trial and the trial court's failure to suppress the evidence upon petitioner's motion to do so constitutes reversible error.

3. The petitioner was denied due process of law when a State's witness was judicial statements based on hearsay stating that he had been placed in protective custody because somebody had put a contract out on his life.

During redirect examination of the State's witness, Eddie Ray Spivey, the alleged accomplice of the petitioner, the witness was allowed to state over objection that prior to trial he was placed in "protective custody" because "somebody had a contract out on (him)." (R p. 59) Again over objection he was allowed to state that a contract was where "somebody paid somebody to kill (him)." (R p. 59) Both of these statements were obviously based on hearsay and highly prejudicial to the petitioner.

There was nothing in them which tended to prove or even allege that the petitioner was the one responsible for putting the alleged "contract" out on the witness. However, the clear intent of the witness and the effect of the testimony was to lead the jury to believe that the petitioner had threatened the witnesse's life. In short, the State attempted through this testimony to paint the petitioner as a bad man who should be convicted without regard to guilt or innocence on the particular charge before the Court but because of his other illegal conduct.

Highly prejudicial testimony such as this should be admitted most reluctantly. Where, as here, the inflamatory testimony does not bear on the defendant's guilt for the particular charges against him, it is most essential that the evidence be excluded.

Professor McCormick defines immaterial evidence as evidence which is "offered to prove a proposition which is not in issue nor probative of a matter in issue." McCormick, Handbook on Law of Evidence 315 (1954). Clearly, proof that the petitioner put a "contract" on Eddie Ray Spivey bears not at all on the issue of petitioner's guilt of attempted safecracking and, since it is not probative of the matter in issue, it should be excluded.

But even assuming that the witness' statements were material and relevant (which the petitioner believes and contends cannot be done) the evidence should have been excluded because of its highly prejudicial nature. The probative value of evidence must outweigh the probability of prejudice before even relevant evidence may be admitted. United States v. Marcey, 440 F.2d 281 (D.C. Cir. 1971). It was clearly the prejudicial effect on the petitioner that caused the State to bring this evidence before the jury. The testimony in question did nothing towards proving the essential elements of the charge against the petitioner, but it was most effective in raising the passions of the jury against the petitioner. The traditional rule has been that testimony will be excluded when the prejudice it "will excite will be so great as to overbalance any assistance (it) may be to the trier." Rogers v. Rogers, 80 N.H. 96, 97, 114 A. 220 (1921). Here the possible prejudice to the petitioner was so very great, and the possible probative value so small, that the testimony should have been excluded.

When you consider the immateriality of the testimony, its highly prejudicial nature and its hearsay basis, then it becomes clear that the trial court erred when it allowed the testimony into evidence before the jury. This error abridged the petitioner's right to due process of law. Petitioner respectfully requests this Court to protect his right

to due process by reversing his conviction and ordering a new trial, free from the prejudicial testimony allowed below.

4. Petitioner was denied due process of law when his conviction was based on the uncorroborated and uncertain testimony of an alleged accomplice.

The only evidence linking the petitioner with the crime charged was the testimony of the alleged accomplice, Eddie Ray Spivey, who was most confused and uncertain. The prosecutor elicited the only testimony damaging to the petitioner through the continuous use of leading questions. It became very clear on cross-examination that the witness needed the guidance of these leading questions to remember the events about which he was testifying. He was frequently forgetful (see, e.g. R pp 48-62) and confused. He could not remember what he or his alleged accomplice were wearing the evening of the crime, (R p. 53) or the date of the crime allegedly occurred. (R p. 52).

Mr. Spivey further testified that he had 50-60 other charges pending against him (R p. 60), and hoped that his testimony in this case might help him get probation for his other crimes, (R p. 55), that he was testifying in order to save his own neck, (R p. 55), and that he had said that he was willing to tell them anything to keep from going to jail, (R p. 55). He also testified that he had told a police officer that if he was sent to jail he would not testify another time, but that he was just "kidding" when he said this. (R p. 58).

It is clear from the above that Mr. Spivey's testimony was most uncertain and its veracity was seriously eroded. The petitioner's freedom thus hinged on the unclear, contradictory, and uncorroborated testimony of the alleged accomplice. To allow the petitioner's conviction to stand on evidence of this type violates the petitioner's right to due process of law.

The common law rule appears to have been that the testimony of an accomplice may be sufficient to warrant a conviction, even though it is not corroborated. Nilva v. United States, 212 F.2d 115 (8th Cir. 1954). However, that rule has been severely limited, and even where it is still recognized the view has been that while a jury may convict on the uncorroborated testimony of an accomplice, they should not do so, and that such testimony is subject to grave suspicion. Madigan v. United States, 23 F.2d 180 (10th Cir).

The reason most generally stated for a rule requiring corroboration of an accomplice is that a witness could otherwise transfer responsibility for a crime from his own shoulders to another's. Guthrie v. Commonwealth, 171 Va. 461, 198 S.E. 481 (1938). It has therefore often been held that corroboration is necessary when there are circumstances which tend to throw suspicion on the testimony of an accomplice, as when the testimony is contradictory, inconsistent, or where it appears that the witness has sworn falsely to a material matter. 23 C.J.S., Criminal Law §810(1)(c). And the corroborative evidence must, without the aid of any testimony of the

accomplice, connect or tend to connect the accused with the crime charged. See, e.g. Ing v. United States, 278 F.2d 362, 367 (9th Cir. 1960); Rozier v. State, 68 Ga. App. 797, 24 S.E.2d 137 (1943).

In the present case there was an overwhelming need for corroborative evidence. The alleged accomplice's testimony was uncertain, inconsistent, and, at points, contradictory. His memory of any but the most basic facts was totally lacking. And over all his testimony are the accomplice's admissions that he was testifying to save his own neck and that he would do and say anything to keep from going to jail. With such testimony from such a witness, the chances of abuse are so obvious and the likelihood that the witness was not truthful so great that the State must be required to properly corroborate the testimony of the accomplice before the accused can be convicted. To allow the petitioner's conviction to stand without such corroboration makes the trial of the petitioner inherently unfair and deprives him of due process of law.

It appears that this Court has never considered the question of whether the failure to corroborate an accomplice's testimony is a deprivation of due process of law. This Court should make this determination because it is an important issue of law and because the rules vary so greatly from state to state. It is clear from the testimony in the present case that to allow an accomplice to testify and to have his uncorroborated testimony serve as the sole basis for the conviction gives rise to such a great chance of abuse and unfairness that such a practice should be declared in violation of an accused's right to due process of law.

5. The petitioner was denied due process of law when the State was allowed on cross-examination to ask the petitioner over the objections of petitioner's attorney whether the petitioner had been involved in a number of break-ins and robberies which had not resulted in convictions.

During his trial, petitioner took the stand and testified on his own behalf. During cross-examination the State's attorney was allowed to ask over the objections of petitioner's attorney whether the petitioner had been involved in a number of break-ins and robberies. (R pp. 74-76) Petitioner answered in the negative to each of these questions. There was no question as to whether the petitioner had been convicted of any of these alleged acts. This testimony was allowed in under the North Carolina rule which allows a cross-examiner, for purposes of impeachment, to ask questions concerning matters relating to a defendant's criminal and degrading conduct. State v. Williams, 279 N.C. 663, 185 S.E.2d 174 (1971). The only limitations placed on this type questioning being left in the discretion of the trial judge and the good faith of the questioner.

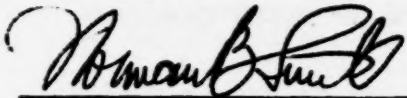
There is a large split of authority on the issue of whether for purposes of impeachment questions about specific acts of misconduct not resulting in convictions may be asked or not. Professor Charles A. Wright stated that the better rule is that a witness may not be impeached by inquiry into specific acts of misconduct not resulting in a conviction. Wright, Federal Practice and Procedure §416 at 190-191 (1969). That view seems to have been adopted by a majority of the federal

circuits. See, Wright, Federal Practice and Procedure §416 and cases cited therein. Other circuits have established the same rule as North Carolina. e.g. United States v. Varelli, 407 F.2d 735 (7th Cir. 1969).

To allow the State to ask the petitioner whether he was involved in one break-in after another, all of which the petitioner answered in the negative, was highly prejudicial since the desired effect was to place in the minds of the jury the fact that the prosecution believed that the petitioner was involved in a large number of robberies and that the petitioner's criminal involvement was far greater than the one criminal charge of attempted safecracking for which the petitioner was then being tried. This gives rise to the real possibility that the jury convicted the petitioner not because they were convinced that of his guilt beyond a reasonable doubt on the single charge then against him but because they believed him to be a dangerous criminal. To subject the petitioner to this type of possible prejudice violates his rights under the due process clause of the Fourteenth Amendment. This Court should grant certiorari in the present case to establish the uniform rule among the federal circuits and across the various states that a criminal defendant cannot be cross-examined as to specific acts of misconduct not resulting in conviction, for to do otherwise deprives the criminal defendant of a trial consistent with due process of law.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for writ of certiorari should be granted.



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APPENDIX TO PETITION

No. 7321SC313 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Session 1973

STATE OF NORTH CAROLINA

v. From Forsyth

JOHN WAYNE SHELTON

Appeal by defendant from Wood, Judge, 16 October 1972 Session of Superior Court, Forsyth County.

Defendant was charged in a bill of indictment with attempted safecracking and entered a plea of not guilty. At trial the State introduced evidence which tended to show the following:

On 28 September 1971 at approximately 1:30 a.m., officers of the Winston-Salem Police Department arrived on the premises of Builder's Harbor, Inc., in response to a call that there was a breaking and entering in progress. As they arrived, the officers observed a white male running in front of the building. The officers gave chase and caught the subject who was later identified as Eddie Ray Spivey. After placing Spivey under arrest the officers entered the building. The front door had been pried open and a safe combination dial, a broken safe hinge, a hammer and a screwdriver were found in an inner office area. Scratch marks were observed on the floor leading to the rear of the building where the officers

found a large black safe. A loaded 32-caliber revolver, a flashlight, a hatchet and a tire tool were found near the safe. The hinges were off the safe as well as the handle which opened the safe door, and the owner of Builder's Harbor, Emory Crawford, testified that there were marks on the safe that hadn't been there the evening before when he closed for business. With the exception of the gun and flashlight, the tools found scattered about the premises were taken from the inventory of Builder's Harbor.

The officers then proceeded through the building and out the front door where they found a 1968 Plymouth autmobile parked in front of the building. Later it was determined that the automobile was registered in the name of the defendant, John Wayne Shelton. The key was in the ignition switch and the hood was still warm. A screwdriver and pry-bar could be seen on the floorboard inside the car. Officers then opened the car and searched inside. A wallet was found in the dash with identification showing that defendant was the owner.

Since another suspect had been seen running from the premises a bloodhound was called to the scene in an attempt to pick up the subject's trail. The bloodhound led officers to a service station where one of the attendants told officers that he had given a ride to two strangers who were later determined to be AWOL servicemen and not in any way connected with the break-in at Builder's Harbor. Meanwhile Officer S. L. Harmon checked the

Builder's Harbor for fingerprints and one print of defendant Shelton was detected on the butt of the flashlight found near the safe.

Eddie Ray Spivey took the stand and testified that in the early evening hours of 27 September 1971, he and defendant were drinking beer and shooting pool at the Ardmore Taproom. They left the taproom and went to a chicken place called the Wishbone where they broke in and took some money and a gun. They then proceeded to Builder's Harbor, broke open the front door and attempted to open the safe they found in one of the inner offices. They knocked the combination dial off the safe and attempted to take the safe door off its hinges. Being unsuccessful they dragged the safe to the rear of the building and were trying to open it when police officers arrived at the scene. Both men ran from the building, and defendant was not caught by the officers.

The gun found at Builder's Harbor was identified by the owner of the Wishbone as being the one missing from his premises after the break-in on 27 September.

The State rested and in brief summary the following evidence was presented by defendant:

On the evening of 27 September 1971 defendant and Eddie Ray Spivey were drinking beer at the Ardmore Taproom and at about 8:30 defendant left with Doris Miller.

Since defendant felt he had had too much to drink he asked Doris to drive her own car and gave the ignition key to his own vehicle to Spivey. Defendant and Doris went to another night spot and then went to Spivey's trailer near Stanleyville at approximately midnight. Defendant testified that no one was at home and the he and Doris watched the late show on T.V. before retiring for the night. The next morning defendant heard on the news that Spivey had been apprehended and then called the police to report that his automobile was missing. Defendant also offered testimony that tended to show the presence of the two AWOL servicemen in the area of Builder's Harbor on the night in question.

On State's rebuttal, Cathy Spivey, wife of Eddie Ray Spivey, testified that on 27 September 1971 before she and Eddie were married, she was living at Eddie's trailer. Vicky McBride and Doris Miller stopped in that evening for approximately 15 minutes and they were the only visitors she had all night. She also testified there was no T.V. in the trailer. The next morning defendant Shelton called and informed her that Eddie had been apprehended by the police at Builder's Harbor and that he had been with Eddie but had eluded the officers.

The case was submitted to the jury who found defendant guilty. Judgment was entered imposing an active sentence of not less than 15 nor more than 25 years from which defendant appealed.

Attorney General Morgan, by Assistant Attorney General Weathers, for the State.

H. Glenn Pettyjohn for defendant appellant.

MORRIS, Judge. Defendant brings forward 17 assignments of error in his brief. However, he has not set forth any properly numbered exceptions upon which those assignments of error are based as required by Rule 28, Rules of Practice in the Court of Appeals of North Carolina, and those exceptions "will be taken as abandoned by him." Nevertheless, in order to determine that justice is done, we have carefully reviewed the record on appeal with respect to all assignments of error brought forward in defendant's brief.

Defendant's first assignment of error is directed to the action of the trial court in allowing into evidence, for the purpose of illustration, photographs of the premises of Builder's Harbor following the break-in. His contention that the State did not properly authenticate the photographs prior to their introduction is not supported by the record. Prior to the introduction of the photographs, Emory Crawford, owner of Builder's Harbor, described the premises immediately following the break-in as to the location of the safe, layout of the building, markings on the floor and the various items found scattered around the building. When handed the photographs depicting various scenes of the premises and asked if he could identify them, Crawford in each instance did so.

The accuracy of a photograph as a true representation of the scene, object or person it purports to portray may be established by any witness who is familiar with such scene, object or person, or who is competent to speak from personal observation. State v. Gardner, 228 N.C. 567, 46 S.E.2d 824 (1948). The photographs were properly admitted into evidence for the purpose of illustrating Crawford's testimony, and this assignment of error is overruled.

Next we examine defendant's contention that the trial court erred in failing to charge the jury that there must be evidence to corroborate the accomplice's (Spivey's) testimony that connects defendant with the crime.

> "In some jurisdictions an accomplice must be corroborated, but in North Carolina the unsupported testimony of an accomplice is sufficient to convict if it satisfies the jury beyond a reasonable doubt. However, it is proper to instruct the jury to be cautious in convicting on such testimony, and refusal to give an appropriate instruction when requested is prejudicial error." I Stansbury's North Carolina Evidence, Brandis Rev., §21, pp. 52-53, and cases cited therein.

The trial court did instruct the jury to be cautious in examining Spivey's testimony. Additionally, in this case the evidence of the accomplice was supported by other evidence. This assignment of error is also without merit.

Defendant also contends that the trial court erred in permitting the State to cross examine defendant about the commission of other crimes of which there was no evidence. Most of the questions dealt with whether the defendant had committed prior break-ins with Eddie Ray Spivey and to each question defendant answered in the negative.

> "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. (Citations omitted.) Such questions relate to matters within the knowledge of the witness, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." State v. Williams, 279 N.C. 663, 675, 185 S.E.2d 174 (1971).

Nothing appears in the record that would indicate any abuse of discretion by the trial court or lack of good faith on the part of the State, and defendant's argument is without substance.

Finally, we examine defendant's contention that the trial court improperly denied his motion for continuance. When the motion was made at the beginning of the trial, the basis therefor now relied upon was not stated. It was only after the verdict was in and judgment entered thereon that defendant suggested that he was not notified by the solicitor which of the several cases against defendant calendared for that session would be tried. Nor has defendant shown any prejudice. Absent an abuse of discretion, a motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling thereon is not subject to review on appeal. State v. Blackmon, 280 N.C. 42, 185 S.E.2d 123 (1971). No abuse of discretion has been shown. This assignment of error is overruled.

All of defendant's other assignments of error have been carefully examined. No prejudicial error has been made to appear.

No error.

Judges BROCK and PARKER concur.

Filed July 13, 1973

No. 148PC TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

Spring Session 1973

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STATE OF NORTH CAROLINA)
)
v.) From Forsyth
)
JOHN WAYNE SHELTON)

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Petition for writ of certiorari by defendant to review the decision of the North Carolina Court of Appeals, 18 N.C. App. 616, 197 S.E.2d 588. Denied.